

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

WAPATO HERITAGE, LLC, a
Washington Limited Liability
Company; KENNETH EVANS; JOHN
WAYNE JONES; and JAMIE JONES,
individual residents of
Washington State,

Plaintiffs,

v.

SANDRA D. EVANS, an
individual, not a resident of
Washington State; and DAN
GARGAN, a citizen of Arizona,

Defendants.

NO. CV-07-314-EFS

**ORDER GRANTING PLAINTIFFS'
MOTION TO DISMISS COUNTERCLAIM
FRCP 12 (b) (6)**

BEFORE THE COURT, without oral argument, is Plaintiffs' Motion to Dismiss Defendant's Counterclaim FRCP 12(b)(6). (Ct. Rec. 87.) Defendant Dan Gargan filed an opposition. After reviewing the submitted material and relevant authority, the Court is fully informed and grants Plaintiffs' motion. The reasons for Court's Order are set forth below.

I. Background

Plaintiffs entered into a Settlement and Release Agreement ("Settlement Agreement") with Defendant Sandra D. Evans on or about September 2, 2005. On October 15, 2007, Plaintiffs filed a complaint alleging that Defendant Evans breached the Settlement Agreement by

1 failing to (1) deliver to Plaintiffs the funds required by Section
2 IV.H.3, and (2) pay Plaintiffs the excess distribution she received from
3 the Bureau of Indian Affairs IIM account of her deceased father, William
4 Wapato Evans. (Ct. Rec. 1 at 8.) Plaintiffs further allege that
5 Defendant Gargan, as Defendant Evans' financial advisor, tortiously
6 interfered with Plaintiffs' reasonable contractual expectations by
7 advising Defendant Evans in connection with the alleged breaches of the
8 Settlement Agreement. *Id.* at 9.

9 On May 16, 2008, Defendant Gargan filed an answer to Plaintiffs'
10 claims along with a counterclaim alleging that Plaintiffs' claims were
11 brought without adequate justification or reasonable investigation in
12 violation of Federal Rule of Civil Procedure 11. (Ct. Rec. 42.)
13 Defendant¹ seeks reasonable attorneys fees and expenses for this alleged
14 Rule 11 violation, and asks the Court to impose sanctions to discourage
15 Plaintiffs, and Plaintiffs' counsel, from engaging in similar future
16 conduct. *Id.* at 8.

17 II. Discussion

18 A. Motion to Dismiss

19 Plaintiffs seek to dismiss Defendant's counterclaim because a Rule
20 11 request must be raised by separate motion - not in a counterclaim.
21 (Ct. Rec. 88 at 3.) Defendant asserts that the counterclaim is properly
22 stated; however, he alternatively seeks Court permission to amend the
23 counterclaim. (Ct. Rec. 104 at 2-4.)

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26 ¹ For ease of reference, Defendant Gargan will be referred to simply
as "Defendant" for the remainder of the Order.

1 A motion to dismiss under Rule 12(b)(6) tests the pleadings' legal
2 sufficiency. *Navarro v. Block*, 250 F.3d 729, 731 (9th Cir. 2001).
3 Dismissal is proper where there is no cognizable legal theory. *Id.*

4 Defendant's Rule 11 counterclaim is procedurally improper for two
5 (2) reasons. First, Defendant moved for sanctions in his counterclaim,
6 which Rule 11 forbids. See FED. R. CIV. P. 11(c)(2) ("a motion for
7 sanctions must be made separately from any other motion"); see also
8 *Lenoir v. Tannehill*, 660 F. Supp. 42, 44 (S.D. Miss. 1986) (finding that
9 Rule 11 sanction requests cannot be raised via counterclaim). Second,
10 Defendant filed his sanctions request without providing notice to
11 opposing counsel, violating Rule 11's twenty-one-day safe-harbor period.
12 See FED. R. CIV. P. 11(c)(2) (requiring moving party to provide notice and
13 allow twenty-one days before filing to provide opposing counsel an
14 opportunity to correct or withdraw the challenged claims). Because
15 Defendant's request is procedurally improper on two (2) separate grounds,
16 the Court grants Plaintiffs' motion and dismisses Defendant's Rule 11
17 counterclaim.

18 Defendant also requests permission to amend his counterclaim to
19 include a malicious prosecution claim. (Ct. Rec. 104 at 2.) The Court
20 denies Defendant's alternative request because it was raised in a
21 responsive pleading, not a motion. The Court directs Defendant to Local
22 Rule 7.1, which requires all motions outside of hearing or trial to be
23 made in writing and accompanied by a memorandum in support of the motion
24 and a notice of hearing. LR 7.1. Defendant is free to file a future
25 motion seeking the relief requested.

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III. Conclusion

Accordingly, **IT IS HEREBY ORDERED:** Plaintiffs' Motion to Dismiss Defendant's Counterclaim FRCP 12(b)(6) (**Ct. Rec. 87**) is **GRANTED**. Defendant's Rule 11 counterclaim (Ct. Rec. 42) is **DISMISSED WITHOUT PREJUDICE**.

IT IS SO ORDERED. The District Court Executive is directed to enter this Order and provide copies to counsel.

DATED this 29TH day of August 2008.

S/ Edward F. Shea

EDWARD F. SHEA

United States District Judge